Supreme Court, U.S.
FILED
JAN 26 2004
OFFICE OF THE CLERK

No. 03-1092

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL F. POLISHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorney for Petitioner

January 2004

QUESTION PRESENTED

Does the failure of a federal criminal defendant to "appeal" to the District Judge the decision of a United States Magistrate Judge on a pretrial discovery issue -- which the Magistrate has been designated by the District Judge "to hear and determine" under 28 U.S.C. § 636(b)-(1)(A) -- waive review of that issue on direct appeal after trial and sentencing?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Polishan and respondent United States).

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
INDEX TO APPENDICES iv
TABLE OF AUTHORITIES iv
PETITION
OPINIONS BELOW 1
JURISDICTION 1
TEXT OF FEDERAL STATUTE AND RULES OF PROCEDURE INVOLVED 2

STATEMENT OF THE CASE
a. Procedural History 10
b. Statement of Facts 11
c. Statement of Lower Court Jurisdiction 13

REASON FOR GRANTING THE WRIT
The Circuits are divided three ways over the question whether a criminal defendant waives the right to appeal a nondispositive pretrial ruling which has been delegated to a United States Magistrate if the defendant fails to "appeal" that ruling to the District Judge 13

CONCLUSION 29

INDEX TO APPENDICES

A. Opinion of the United States Court of Appeals for the Third Circuit, published at 336 F.3d 234 (3d Cir., July 14, 2003).

B. Memorandum and Order of the United States District Court for the Middle District of Pennsylvania (Vanaskie, Ch.J.) on post-trial motions, available at 2001 WL 848583

C. Order denying rehearing (3d Cir., filed August 27, 2003).

TABLE OF AUTHORITIES

CASES

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 23

Kontrick v. Ryan, 540 U.S. --, 124 S.Ct. 906 (Jan. 14, 2004) 14

Koon v. United States, 518 U.S. 81 (1996) 23

Mathews v. Weber, 423 U.S. 261 (1976) 15

Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159 (10th Cir. 1986) 25

Siers v. Morrash, 700 F.2d 113 (3d Cir. 1983) 17

Thomas v. Arn, 474 U.S. 140 (1985) 18, 27

United States v. Abonce-Barrera, 257 F.3d 959 (9th Cir. 2001) 14, 26

United States v. Akinola, 985 F.2d 1105 (1st Cir. 1993) 14, 17

United States v. Brown, 299 F.3d 1252 (11th Cir. 2002), *vacated and remanded*, 538 U.S. --, 123 S.Ct. 1928 (2003), *reinstated*, 342 F.3d 1245 (11th Cir. 2003) 13, 14, 17, 21, 28, 29

United States v. Brown, 79 F.3d 1499 (7th Cir. 1996) 14
United States v. Gil, 297 F.3d 93 (2d Cir. 2002) . 11, 28
United States v. Moscow, 588 F.2d 882 (3d Cir. 1978) 17
United States v. Olano, 507 U.S. 725 (1993) 14
United States v. Renfro, 620 F.2d 497 (5th Cir. 1980) 14, 17, 19
United Steelworkers v. New Jersey Zinc Co., 828 F.2d 1001 (3d Cir. 1987) 19
Will v. United States, 389 U.S. 90 (1967) 22

CONSTITUTION, STATUTES AND RULES

15 U.S.C. §§ 78j(b) & 78ff 10
18 U.S.C. § 1001 10
18 U.S.C. § 1344 10
18 U.S.C. § 3231 13
18 U.S.C. § 3401(a) 17
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 ..... 13, 16, 17
28 U.S.C. § 636 16
28 U.S.C. § 636(a) 24, 25
28 U.S.C. § 636(b) 15-18, 21-24, 26
28 U.S.C. § 636(c) 19
Fed.R.Civ.P. 72(a) 15, 16, 18, 27
Fed.R.Crim.P. 1(b) 28
Fed.R.Crim.P. 16(a) 10
Fed.R.Crim.P. 52(b) 28
Fed.R.Crim.P. 57(a) 24
Fed.R.Crim.P. 58(g) 17

Loc.R. 72.2 (M.D.Pa.) 16, 21, 22, 24, 25
S.Ct. R. 13.1, 13.3, 13.5 2
S.Ct. R. 14.1(g)(ii) 13

MISCELLANEOUS:
http://www.uscourts.gov/rules/index.html#advspring . 27
U.S. Brief in Opp., *Brown v. United States*
(No. 02-8263) (filed April 4, 2003) 14, 15, 17, 28

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Paul F. Polishan respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his convictions and sentence for securities fraud and related offenses.

OPINIONS BELOW

The Third Circuit's precedential Opinion (per Ambro, J., with Rendell and Magill [8th Cir.], JJ.), was filed July 14, 2003; see United States v. Polishan, 336 F.3d 234 (3d Cir. 2003). A copy is attached as Appendix A. The United States District Court for the Middle District of Pennsylvania (Vanaskie, Ch.J.) wrote an opinion on post-trial motions, available as 2001 WL 848583. A copy is Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the applicant's convictions on securities fraud and related charges was filed and entered on July 14, 2003. Appx. A. The applicant's timely petition for rehearing was denied by the Third Circuit on August 27, 2003. Appx. C. By Order dated November 14, 2003, under No. 03A416, Justice Souter extended until Saturday, January 24, 2004, the time for filing a petition for a writ of certiorari in this case. This petition is being filed by postmark

on the first business day following that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE AND RULES OF PROCEDURE INVOLVED

Section 636 of title 28, United States Code, the Magistrates Act, as amended in 1994, provides, in pertinent part:

> **Jurisdiction, powers, and temporary assignment**
>
> (a) Each United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment --
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;
>
> (4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary --

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made

by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magis-

trate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary -

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. * * *

* * * *

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) **Contempt Authority.--**

(1) **In general.--** A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

* * * *

(7) **Appeals of magistrate judge contempt orders.--** The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. * * *

(g) * * * *

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve * * * *

28 U.S.C. § 636.

The Federal Rules of Civil Procedure provide, in pertinent part:

> **Rule 72. Magistrate Judges; Pretrial Orders**
>
> **(a) Nondispositive Matters.** A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.
>
> **(b) Dispositive Motions and Prisoner Petitions.** A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall

enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed.R.Civ.P. 72.

The Local Rules of the United States District Court for the Middle District of Pennsylvania provide, in pertinent part:

> **LR 72.2. APPEALS FROM NON-DISPOSITIVE ORDERS OF MAGISTRATE JUDGES**
>
> Any party may appeal from a magistrate judge's order determining a non-dispositive pretrial motion or matter in any civil or criminal case in which the magistrate judge is not the presiding judge of the case, within ten (10) days after issuance of the magistrate judge order, unless a different time is prescribed by the magistrate judge or a judge. The party shall file with the clerk of court, and serve on the magistrate judge and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. At the time the appeal is filed, the appellant shall also file a brief addressed to the issue raised by the objection to the order or part appealed from. Any party opposing the appeal shall file a responsive brief within ten (10) days after service of the appellant's brief. A brief in reply may be filed within seven (7) days after service of the opposing party's brief. A judge of the court shall consider the appeal and shall set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. The judge may also reconsider sua sponte any matter determined by a magistrate judge under this rule.

LR 72.2 (M.D.Pa.).

STATEMENT OF THE CASE

This petition presents important and recurring questions concerning the authority of a district court to limit, by a local rule of procedure, the power of a United States Court of Appeals to consider an issue on appeal after trial, and the extent of the power vested in a United States Magistrate Judge when a nondispositive pretrial matter is referred to that jurist "to hear and determine."

a. ***Procedural History***

Petitioner Paul F. Polishan was chief financial officer of The Leslie Fay Companies ("LFC"), an issuer of publicly traded securities. Mr. Polishan was convicted after a 35-day bench trial in the Middle District of Pennsylvania on 18 counts of securities fraud and related charges (15 U.S.C. §§ 78j(b) & 78ff; 18 U.S.C. §§ 371, 1001, 1343, 1344), arising out of accounting irregularities at LFC.

On appeal petitioner raised several issues, one of which was a claimed abuse of discretion in the District Court's management of the massive amount of pretrial document discovery, which was delegated to a United States Magistrate Judge. Up to a million unindexed documents were made available to the defense by the government for a period of time, but the documents then became unavailable during the months leading up to trial. After discovery closed, the government marked as exhibits some 2000 documents supposedly "intended for use ... as evidence in chief at the trial," Fed.R.Crim.P. 16(a)(1)(C), the overwhelming majority of which were never used during the trial. The premarked exhibits also

omitted many important documents which were used. The appellant argued to the Third Circuit that the totality of the discovery process, as permitted by the court below, represented an abuse of discretion which resulted in an unfair trial. The Second Circuit so held, in a remarkably similar case, less than two years ago. See *United States v. Gil*, 297 F.3d 93, 98-107 (2d Cir. 2002).

The court of appeals held, however, that petitioner had not properly preserved this issue for appeal. Appx. A4-6, 336 F.3d at 238-41. The court ruled that this issue was "waived" by petitioner's failure to "appeal" the Magistrate Judge's pretrial discovery ruling to the District Judge. The panel therefore declined to reach the merits of the discovery issue. Appx A4, 336 F.3d at 239 n.2. The panel held that at least when a local rule authorizes an "appeal" to the District Judge, in a criminal case, of the ruling of a Magistrate Judge on a non-dispositive matter, the failure to exercise that option waives the issue for later appellate review after conviction, even though neither the local rule nor any federal rule or statute so provides. Appx. A6, 336 F.3d at 241.

Petitioner's bail pending appeal was revoked after the filing of the court of appeals' judgment, and he is now in custody serving the nine-year sentence imposed in this case.

b. *Statement of Facts*[1]

In 1987, petitioner Polishan became the Senior Vice President of Finance, Chief Financial Officer and Chief Accounting Officer of LFC. Polishan ran Leslie

[1] The following Statement is closely based on that of the court of appeals. *See* Appx. A2-6.

Fay's Hanover, Pennsylvania, facility, located near Scranton, supervising its financial operations and the employees involved in those operations. In January 1993, accounting irregularities at LFC came to light, for which LFC's Corporate Controller and Polishan's direct subordinate, Donald F. Kenia, initially claimed full responsibility. The LFC Board of Directors' Audit Committee began an investigation. Two weeks later, during interviews conducted by attorneys and accountants retained by the Audit Committee, Kenia stated that Polishan had directed the illegal conduct. Kenia similarly implicated Polishan in subsequent interviews with federal law enforcement authorities.

In September 1993, the Audit Committee issued a 369-page report concluding that, because of unsupported entries in its ledgers, LFC had overstated by more than $75 million its pre-tax net income for the years 1990-1992. As part of the investigation resulting in the issuance of that report, LFC President Babcock asked Roger Vallecorse, former Vice President of Human Resources, to interview Polishan, Kenia, and the divisional controllers who worked under Polishan and Kenia. The Audit Committee Report did not conclude formally that Polishan participated in the fraud, but did detail the evidence that supported that conclusion (including Kenia's statements). App. A2-3; 336 F.3d at 237-28. Petitioner Polishan took the stand in his own defense and testified in detail about the questioned transactions and decisions, denying any knowledge of or participation in the fraudulent activities at LFC. Petitioner also called character witnesses. The trial court, however, found his explanations to be "implausible and unsubstantiated." App. B13.

c. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)*** The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASON FOR GRANTING THE WRIT

The Circuits are divided three ways over the question whether a criminal defendant waives the right to appeal a nondispositive pretrial ruling which has been delegated to a United States Magistrate if the defendant fails to "appeal" that ruling to the District Judge.

This Court should decide whether the failure of a federal criminal defendant to "appeal" the decision of a United States Magistrate Judge on a pretrial discovery issue, which the Magistrate has been designated by the District Judge "to hear and determine," waives review of that issue on direct appeal after trial before the District Judge and the entry of a judgment of sentence. There is a three-way split in the Circuits on this question, as the Solicitor General has recently pointed out, with the government now agreeing with none of the Circuits' positions, including that of the court below. See *Brown v. United States*, 538 U.S. --, 123 S.Ct. 1928, 155 L.Ed.2d 847 (May 5, 2003) (vacating and remanding for further consideration of Solicitor General's position);

Brief in Opp. (No. 02-8263) (filed April 4, 2003).[2] Certiorari should be granted to resolve this vexed procedural issue, the unsettled state of which interferes with pretrial decisions of the parties, and undermines the decisionmaking authority of the circuit courts and the rulemaking authority of this Court.

One Circuit holds that the defendant need not seek review by the District Judge of the Magistrate Judge's ruling at all in order to preserve the issue for later appeal. See *United States v. Abonce-Barrera*, 257 F.3d 959, 967-69 (9th Cir. 2001). Two Circuits hold that in this circumstance, the court of appeals lacks jurisdiction over the issue. See *United States v. Akinola*, 985 F.2d 1105, 1108-09 (1st Cir. 1993); *United States v. Renfro*, 620 F.2d 497 (5th Cir. 1980). The court below, agreeing with the Seventh Circuit, holds that there is a "waiver," which may be "excused" in the event there are extraordinary circumstances justifying it. See *United States v. Brown*, 79 F.3d 1499, 1503-04 (7th Cir. 1996) (apparently meaning something like a procedural default or forfeiture; see *Kontrick v. Ryan*, 540 U.S. --, 124 S.Ct. 906 (Jan. 14, 2004) (slip op. at 14 n.13); *United States v. Olano*, 507 U.S. 725, 733 (1993) (forfeiture defined as "failure to make the timely assertion of a right,"

---

[2] This Court's memorandum vacated and remanded *United States v. Brown*, 299 F.3d 1252, 1259-60 (11th Cir. 2002). On remand, the panel adhered to its prior, erroneous decision notwithstanding the views of the Solicitor General, holding themselves, as a panel, bound by the *Renfro* precedent of the old Fifth Circuit. Each of the three judges on the panel wrote a separate opinion. *See* 342 F.3d 1245 (11th Cir. 2003).

whereas waiver is defined as "intentional relinquishment or abandonment of a right"). The Solicitor General, idiosyncratically, advocates "plain error" review in this situation. *See* Brief in Opp., *Brown v. United States*, No. 02-8263, at ¶1 (final sentence).

The assigned District Judge lawfully delegated the pretrial management of discovery in this case to a United States Magistrate Judge, by "designat[ing]" that jurist to "hear and determine" those issues. *See* 28 U.S.C. § 636(b)(1)(A).[3] In a civil case, Fed.R.Civ.P. 72(a) treats a Magistrate Judge's unreviewed nondispositive ruling as "final," unless a party asks the District Judge to "reconsider" that ruling, as the statute puts it. 28 U.S.C. § 636(b)(1)(A).[4] Civil Rule 72(a) further states that "a

---

[3] The designation order used the term "special master," 6 CA3 GSA 1427, but this was inapt. (The abbreviation "CA3 GSA" refers to items contained in the government's Supplemental Appendix filed in the Third Circuit, some of which were not reprinted in the appellant's appendix.) *Cf.* 28 U.S.C. § 636(b)(2) ("A judge may designate a magistrate to serve as a special master in any civil case ...."; there is no authority for the appointment of a "special master" in a criminal case). The full text of the pertinent sections of § 636 are reprinted under Statute and Rules of Procedure Involved, *ante*. Despite the mistaken terminology of the referral order, "The Magistrate [Judge] here acted in his capacity as magistrate, not as a special master, under a reference authorized by [the Magistrates] Act ...." *Mathews v. Weber*, 423 U.S. 261, 274-75 (1976).

[4] The Civil Rule establishes a procedure for seeking reconsideration, which it calls filing "objections." *See* Federal Statute and Rules of Procedure Involved, *ante*.

party may not assign as error a defect in the magistrate judge's order to which objection was not timely made." The court below acknowledged that there is nothing in the Federal Rules of Criminal Procedure or in 28 U.S.C. § 636 -- in contrast with the explicit language of Civil Rule 72(a) -- which sets forth any requirement that a final action of the Magistrate Judge under a subsection (b)(1)(A) reference in a criminal case be reviewed, approved or adopted by the District Judge before it can be made the subject of argument when an appeal is later taken from the entry of judgment of sentence. Yet the court below held that the discovery issue in this case was "waived" by petitioner's failure to "appeal" the Magistrate Judge's ruling to the District Judge under a local Middle District rule. This dubious analysis calls for this Court's review.

Before reaching the issue of waiver in this case, the court below properly addressed a question of appellate jurisdiction that the government had raised. Since jurisdiction is always subject to examination, petitioner will address that point briefly first. The Third Circuit properly held that the court of appeals did not lack jurisdiction to consider the discovery issue on account of petitioner's "failure" first to take an "appeal" to the District Judge under Middle District Rule 72.2, which the governing statute, 28 U.S.C. § 636(a)(1)(A), calls "reconsideration." App. A6-A7. Unless Congress has expressly limited the courts of appeals' authority to consider an issue, that court has "jurisdiction" in a criminal case over all antecedent questions when the defendant takes a timely appeal under 28 U.S.C. § 1291 from the entry of judgment after sentencing. See *United*

States v. Moscow, 588 F.2d 882, 888-89 (3d Cir. 1978) (Aldisert, J.). The court below was therefore correct to conclude that the question, if any (even in a civil case), is one of possible waiver (what may be "assign[ed] as error," as Civil Rule 72(a) puts it), not a problem of appellate jurisdiction.[5]

In ways not adequately addressed by the court below, the language of the applicable statute and rule make clear that review by the trial judge of a Magistrate Judge's nondispositive, pretrial rulings in a criminal case is optional, so that a failure to "object" or "appeal" to the District Judge does not give rise to a "waiver." Section 636(b)(1)(A) states that a "judge of the [district] court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law." This

---

[5] The First Circuit has quoted language out of context from *Siers v. Morrash*, 700 F.2d 113 (3d Cir. 1983), a collateral order case, and applied it to bar review of an issue in a direct criminal appeal on the spurious basis of lack of jurisdiction. See *United States v. Akinola*, 985 F.2d 1105, 1108 (1st Cir. 1993). For the reasons given by the Solicitor General in *Brown*, note 2 *ante*, as a jurisdictional holding under 28 U.S.C. § 1291, *Akinola* was obviously wrongly decided. *United States v. Renfro*, 620 F.2d 497 (5th Cir. 1980), makes the same mistake in holding that the court of appeals lacks jurisdiction to review an unobjected-to magistrate judge discovery ruling in a criminal case, because "Appeals from the magistrate's rulings must be to the district court." Id. at 500. The only "appeals" about which that statement is correct are appeals from judgments of conviction entered by Magistrate Judges for a petty offense, or in misdemeanor cases tried under 18 U.S.C. § 3401(a). *See* Fed.R.Crim.P. 58(g).

contrasts with the language of § 636(b)(1)(B), governing referrals of dispositive matters (such as a pretrial motion to dismiss the indictment), where the Magistrate Judge is empowered only to issue a report and recommendation. As to such potentially dispositive matters, subsection (B) expressly requires an "objection" to be filed within a specified period of time.

Nondispositive matter, on the other hand, may be referred to a Magistrate Judge to "determine." The Magistrates Act applies to criminal cases, but contains no provision for either "objections" or "appeal" of the Magistrate Judge's "determin[ation]" of nondispositive matters. The statute merely authorizes the district judge to "reconsider" a nondispositive pretrial matter that has been referred, "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

Subsection (A), applicable to nondispositive pretrial matters, says nothing about the consequences of not filing an objection or request for reconsideration. In civil cases, such requirements are supplied by Rule 72(a), but there is no equivalent in the Criminal Rules. As this Court has noted, the legislative history of the Magistrates Act makes clear that the ruling of a Magistrate Judge on a nondispositive, pretrial matter was intended by Congress to constitute the "final" decision of the district court on that matter, "unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination." *Thomas v. Arn*, 474 U.S. 140, 151 n.10 (1985). The decision of the court below, joined in its confusion by several other circuits, disregards that fundamental insight into the statutory structure.

For this reason, it is in no way "manifestly unfair" to either the government or "the district court" (App. A10, quoting post-trial opinion, App. B27) for a criminal defendant to raise an issue on appeal which has been authoritatively ruled upon before trial, simply because the party aggrieved elected not to avail himself of an opportunity to seek "reconsider[ation]." From the moment of designation forward, the Magistrate Judge's actions were, by law, acts of the District Court, taken by a "judicial officer" of that court (*see* 28 U.S.C. § 636(c)-(1)) within the scope of his assigned authority. The court below, following prior panel decisions, followed a different and mistaken understanding -- that only the act of a district judge can be an act of the "district court." *See* App. A8, A10, quoting, *inter alia*, *United Steelworkers v. New Jersey Zinc Co.*, 828 F.2d 1001, 1008 (3d Cir. 1987). But the Magistrate Judge, within his or her authority, also acts for the Court, as may the Clerk. The suggestion that the "district court" is deprived of the opportunity to rule when there is no § 636(b)(1)(A) request for "reconsideration" is fallacious.[6] Moreover, under Middle District Local Rule 72.2, the District Judge may "reconsider sua sponte any matter determined by a magistrate judge under this rule"; moreover, the

[6] One case cited by court below for this proposition, *United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980) (*see* App. A10), actually holds that the court of appeals lacks *jurisdiction* to review an unobjected-to magistrate judge discovery ruling in a criminal case; that is an entirely different line of reasoning from a theory of excusable forfeiture. As the decision of the court below shows, and as discussed at pages 16-17 *ante*, *Renfro* was wrongly decided on the jurisdiction issue.

District Judge has the power to withdraw the referral at any time.

In no other phase of litigation must a party have sought reconsideration in order to preserve an issue for appeal. To the contrary, requests for reconsideration of decided matters are ordinarily discouraged. Both subsection (a) and subsection (b) of Criminal Rule 51 express this philosophy.[7] Congress must be presumed to have chosen that term for § 636(b)(1)(A) advisedly; "reconsider" implies optional, not mandatory, review of an order which is otherwise "final" and ripe for appellate review at the appropriate time. In a criminal case, when exercising authority permitted by law to be assigned to a magistrate, the Magistrate Judge acts not only for but also as "the district court," not merely in an ancillary or advisory capacity. (The situation is precisely analogous to a three-judge panel, which acts for the court of appeals, and whose decision can be reviewed on certiorari as such, whether or not rehearing has been sought from the court *en banc*.) In this, as in any number of other situations, a reversal may result without any attribution of personal fault to the District Judge and

[7] Fed.R.Crim.P. 51(a) provides that after the district court rules adversely to a party, it is not necessary to take or preserve an "exception" in order to raise the issue later on appeal. Rule 51(b) provides that preservation of an issue for appeal in a federal criminal case requires only that the party -- "when the court ruling or order is made or sought" -- inform the court "of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Reconsideration (much less "appeal") is never required.

due to circumstances entirely outside his or her personal control.[8]

Middle District of Pennsylvania Local Rule 72.2, on which the court below ultimately relied for its decision, does not support the ruling.[9] In criminal case, the local rule fills the gap left by § 636(b)(1)(A) (and by Civil Rule 72) by specifying a procedure (which the local rule inadvisably calls an "appeal") and a time limit (ten days) for any party wishing to invoke the District Judge's authority to "reconsider" (as the statute puts it) a Magistrate Judge's nondispositive ruling.[10] As the Third

---

[8] This result is not "unfair." *See* App. A10. A District Judge who does not wish to entrust a category of pretrial rulings to the Magistrate Judge need not refer that matter. People in all walks of life find they must delegate some of their responsibilities to others -- most of them far less highly qualified and trustworthy in their fields than U.S. Magistrate Judges -- and then live with the consequences; seldom would the delegator feel s/he was "forced" to review every one of the delegate's actions simply because the delegator might later be held accountable for the delegate's decision.

[9] The full text of LR 72.2 (M.D.Pa.) is in the Statute and Rules of Procedure Involved section of this petition, *ante*.

[10] In the absence of such a local rule, and in light of the silence of the statute and absence of a Federal Criminal Rule, a party wishing to seek reconsideration of a Magistrate Judge's nondispositive order in a federal criminal case apparently may do so at any time while the proceedings remain pending in the District Court. See *United States v. Brown*, 299 F.3d 1252, 1260 n.10 (11th Cir. 2002), *vacated and remanded*, 538 U.S. --, 123 S.Ct. 1928 (2003), *reinstated*, 342 F.3d 1245 (11th Cir. 2003) (with two separate concurrences).

Circuit notes, the legislative history allows such purely procedural matters to be set by local rule. App. A6. The court below failed to address, however, how the rulemaking authority of a local district court could extend so far as to limit the review power of a court of appeals.

The standard of review set forth for district court reconsideration under § 636(b)(1)(A), echoed in Middle District Local Rule 72.2, confirms that a local rule's "appeal" mechanism cannot be invoked as a bar to appellate review of a Magistrate Judge's pretrial discovery ruling in a criminal case. The statute and rule, as written, do not even contemplate district court review of most discovery orders. After all, a discovery ruling can be reversed on appeal only for abuse of discretion. See *Will v. United States*, 389 U.S. 90, 104 (1967). Congress and the Middle District Judges, however, do not allow review or reconsideration of a Magistrate Judge's nondispositive ruling on the basis of abuse of discretion, nor does the statute or local rule allow *de novo* review. Only if the District Judge finds "clear error," which is the standard for mistakes in factfinding, or an error by the Magistrate Judge in selecting or applying the governing legal precept will the judge overturn the magistrate's ruling. LCR 72.2 ("clearly erroneous or contrary to law"). Thus, under the plain language of Middle District Local Rule 72.2 and 28 U.S.C. § 636(b)(1)(A), the ruling in question was not subject to pretrial district court review at all in this criminal case, where, as here, it is not claimed that the Magistrate Judge conducted mistaken factfinding or that he violated any statute, rule, or other legal precept.

Of course, a discretionary decision predicated on clearly erroneous factfinding or error of law would be an abuse of discretion. See *Koon v. United States*, 518 U.S. 81, 100 (1996) (legal error); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400-01 (1990) (factual error). But much abuse-of-discretion review, such as was invoked by petitioner in this appeal, is not of that kind, and the statute does not even allow the District Judge to disturb a Magistrate Judge's nondispositive ruling on the basis of the kind of "abuse of discretion" that petitioner asserted here. It is hardly sensible to think Congress intended to mandate that discovery orders (or other discretionary matters) be reviewed under § 636(b)(1)(A) before they could be appealed, and yet made the standard of review different in the district court than it would be when the matter reached the appellate court. Under that bizarre regime, the discovery order would have to be "affirmed" by the District Judge so long as the Magistrate Judge avoided clearly erroneous factfinding and mistakes in selecting or interpreting the governing legal rules, even though the same order might be overturned in the court of appeals for abuse of discretion.

The approach of the court below thus leads to a totally illogical result. When district judges make pretrial discovery rulings themselves, their decisions can be reversed (on eventual appeal to the governing circuit) for abuse of discretion (a point with which petitioner of course does not disagree). But if discovery matters are delegated under § 636(b)(1)(A) to a Magistrate Judge, the decision below concludes, then a Local Rule may come into play, making what Congress established as discretionary "reconsideration" into a mandatory prereq-

uisite to appellate review. Under such a rule (as under subsection (b)(1)(A) itself), the standard of review is different, and the lower jurist's decision cannot be overturned by anyone, including the court of appeals, unless shown to be "clearly erroneous or contrary to law." App. A6 (quoting § 636(b)(1)(A)). That is not what the statute says, and simply cannot be right. The more logical interpretation is that when Congress legislated the extremely limited grounds for reconsideration that a District Judge may exercise under § 636(b)(1)(A), it was expressing its understanding that the Magistrate Judge's rulings on matters within the scope of the designation would indeed be the final rulings of the District Court.[11]

The language of Local Rule 72.2 merely permits but does not require an "appeal" ("any party may appeal ....") of the Magistrate Judge's order on a non-dispositive matter. A local rule must be consistent with and not duplicative of federal rules and statutes. *See* Fed.R. Crim.P. 57(a)(1). If Local Rule 72.2 were interpreted, as did the court below, to mandate -- on pain of losing the right to raise the issue later on direct appeal -- an objection where national law does not, the result would not be a waiver finding enforceable against the defendant. Rather, the local rule would be invalidated

[11] In any event, while it is true that petitioner did not "object" or "appeal" within ten days of the Magistrate Judge's ruling, the court below was mistaken in asserting that he "instead wait[ed] until after the trial." App. A9. About ten days before trial was to begin, the defense filed a Motion *in Limine*, bringing to Judge Vanaskie's attention the problems with access to government trial exhibits which were flowing from the discovery procedures. 2App. 231-34, 242 (CA3).

for exceeding the authority of a district court's rulemaking authority.[12] In short, nothing in the statute, and nothing in any rule of procedure applicable to appeals in criminal cases, makes review or approval by the District Judge a prerequisite to raising on appeal a complaint about a Magistrate Judge's final ruling on a nondispositive pretrial matter.

The court below was also mistaken in endorsing the expressed view of Chief Judge Vanaskie that allowing appeals based on unreviewed nondispositive rulings of Magistrate Judges would be "wasteful of scarce judicial resources" and would "frustrat[e] the policy behind the Magistrate's Act, i.e., to relieve courts of unnecessary work ...." App. A10 (quoting App. B27 and *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1165 (10th Cir. 1986)). To the contrary, the interpretation of § 636(a)(1)(A) and the Local Rule enforced by the opinion below would require counsel -- particularly criminal defense counsel, but also prosecutors, at least to preserve their right to assert positions as appellee if not as appellant -- to file constant and numerous "appeals" (in reality, reconsideration requests) to the District Judge from otherwise-final, nondispositive rulings of the Magistrate Judge, if the Magistrate Judge's determination of an issue might conceivably later give rise to an issue for appeal. The waste of judicial resources will be

[12] Nor does the wording of Middle District Rule 72.2 necessarily purport to do so. Local Rule 72.2 should not be construed so that it would be contrary to the federal statute or rules.

far greater than under the interpretation advocated by petitioner.[13]

The absence from the Criminal Rules of any provision requiring a district judge to act before an issue decided by a Magistrate Judge can come before the court of appeals, in contrast with the Civil Rules, is powerful evidence that a party aggrieved by a Magistrate Judge's ruling, in a criminal matter properly assigned to that jurist, is not required first to seek relief from a District Judge. This was the conclusion of the Ninth Circuit in *United States v. Abonce-Barrera*, 257 F.3d 959, 967-69 (9th Cir. 2001), which also approves the statutory analysis of § 636(b) presented in this petition. The thorough and typically thoughtful analysis of the issue by Judge Wallace in that case exposes and completely refutes the mistakes made by Third Circuit below, as well as by the First, Fifth, Seventh and Eleventh Circuits in their earlier discussions of the issue.[14] The court below did not attempt to explain why *Abonce-Barrera* is not the better reasoned, relying instead on the existence

---

[13] Even if such interlocutory "appeals" are filed, the "waste of resources" that the decision below fears -- apparently referring to a new trial that might be avoided if the District Judge disagreed with and overturned a complained-of ruling by the Magistrate Judge -- would not necessarily be defeated. As noted, the standard of review on "reconsideration" authorized by subsection (b)(1)(A) and Local Rule 72.2 is not *de novo*; it is quite limited. Thus, even if the District Judge disagreed with the Magistrate Judge's ruling, s/he would not in most cases even be allowed to overturn it.

[14] *See* App. A9 & n.4; *see also* pages 16-17 & n.5 *ante*.

of Local Rule 72.2. But as already explained, that Rule cannot begin to carry the weight assigned to it in this case.

The reliance of the Court below on prior decisions in civil cases is also inadequate, because of the controlling significance of Civil Rule 72(a) in those decisions. The plain language of Rule 72 ("a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made") creates in a civil case at least a presumption of later non-reviewability of a magistrate judge's nondispositive pretrial ruling to which no objection was lodged. See *Thomas v. Arn*, 474 U.S. 140 (1985). The absence of equivalent language from the Federal Rules of Criminal Procedure is itself telling evidence that there is no parallel bar to raising issues in a criminal appeal which were decided only by a Magistrate Judge.[15]

---

[15] At its meeting in June 2003, the Judicial Conference Standing Committee on Rules of Practice and Procedure approved for publication a proposed new Federal Criminal Rule 59, modeled on Civil Rule 72. See http://www.uscourts.gov/rules/index.html#advspring. Rule 59, if approved and adopted after the public comment period, would for the first time create a requirement to "object" to a Magistrate Judge's determination of a non-dispositive pretrial matter referred under 28 U.S.C. § 636(b)(1)(A). Under that proposal, "Failure to object in accordance with this rule waives a party's right to review." That rule, if adopted, would become effective December 1, 2005. For some of the reasons expressed in this petition, that proposal is not a good idea, and may not be adopted. At best, without this amendment, the question now is open and the present state of the law uncertain. It is unfair to impose a waiver on petitioner

Finally, the suggestion of the Solicitor General in *Brown v. United States*, 538 U.S. --, 123 S.Ct. 1928, 155 L.Ed.2d 847 (May 5, 2003), that "plain error" review under Fed.R.Crim.P. 52(b) should apply in this situation[16] does not withstand analysis. The subject matter of Rule 52(b) is an error which "was not brought to the court's attention." Thus, the Solicitor General's proposed solution depends on the same fallacy as that of the court below -- that the Magistrate Judge, when designated to "hear and determine" a nondispositive pretrial matter in a federal criminal case, does not act as and for "the court." But the federal criminal rules define "court" as meaning "a federal judge performing functions authorized by law," Fed.R.Crim.P. 1(b)(2), and in turn define "federal judge" to mean, *inter alia*, "a magistrate judge." *Id.*(b)(3)(B). Cases such as petitioner's do not involve errors which were not brought to the court's attention, but rather rulings which the party did not ask a second judicial officer of the district court to review. It is telling, of course, that no Circuit, despite what is

_____(cont'd)

through case law, when the statute, on its face, merely authorized him to seek "reconsideration," and neither the statute nor the federal rules clearly called upon him to "object" or "appeal." For these reasons, and for the reasons which led the Second Circuit to reach a conclusion favorable to him on the merits of the *Brady*/discovery issue in a similar case, *United States v. Gil*, 297 F.3d 93, 98-107 (2d Cir. 2002), the court below abused its discretion in failing to find "extraordinary circumstances" to excuse his "waiver" if indeed any waiver there was.

[16] *See* Brief in Opp., No. 02-8263, at ¶1 (final sentence).

otherwise a three-way split, has endorsed the Solicitor General's view or adopted that approach -- not even the Eleventh Circuit on remand from this Court in *Brown*, despite the rendition of three separate opinions from that panel. *See* 342 F.3d 1245 (11th Cir. 2003).

Resolution of this division of opinion in the Circuits demands the attention of this Court, given the adverse and unfair consequences of the erroneous decision of the court below. The petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner PAUL F. POLISHAN prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his conviction for securities fraud and related offenses.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
Attorney for Petitioner

January 24, 2003.

APPENDIX A

336 F.3d 234
61 Fed. R. Evid. Serv. 1276

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1325

UNITED STATES of America

v.

Paul F. POLISHAN, Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(No. 3:CR-96-274),
Honorable Thomas I. Vanaskie, Chief Judge

Argued March 10, 2003
Filed July 14, 2003

*237

Peter Goldberger (Argued)
Ardmore, Pa., for Appellant
Thomas A. Marino, United States Attorney
Bruce Brandler (Argued)
Assistant United States Attorney
Harrisburg, Pa.
Lorna N. Graham, Assistant United States Attorney
Scranton, Pa., for Appellee

BEFORE: RENDELL, AMBRO and MAGILL,* Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge.

Paul F. Polishan appeals his conviction on charges of conspiracy, securities fraud and other related offenses. He argues that the District Court erred in rulings relating to pre-trial discovery procedures and to the admission of evidence at trial. We hold that Polishan waived his right to appeal the rulings on pre-trial discovery procedures by failing to comply with the procedural requirements of a local rule and we find no error in the admission of evidence to which Polishan objects. Thus we affirm.

I. *Factual Background*

In 1987, Polishan became the Senior Vice President of Finance, Chief Financial Officer and Chief Accounting Officer of Leslie Fay Companies (LFC). Polishan ran Leslie Fay's Hanover, Pennsylvania facility, supervising its financial operations and the employees involved in those operations. In January 1993, accounting irregularities at LFC came to light, for which LFC's Corporate Controller and Polishan's direct subordinate, Donald F. Kenia, initially claimed full responsibility. The LFC Board of Directors' Audit Committee began an investigation. Two weeks later, during interviews

---

* Honorable Frank J. Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

conducted by attorneys and accountants retained by the Audit Committee, Kenia stated that Polishan had directed the illegal conduct. Kenia similarly implicated Polishan in subsequent interviews with federal law enforcement authorities.

In September 1993, the Audit Committee issued a 369-page report concluding that, because of unsupported entries in its ledgers, LFC had overstated by more than *238 $75 million its pre-tax net income for the years 1990-1992. As part of the investigation resulting in the issuance of that report, LFC President Babcock asked Roger Vallecorse, former VicePresident of Human Resources, to interview Polishan, Kenia, and the divisional controllers who worked under Polishan and Kenia. The Audit Committee Report did not conclude formally that Polishan participated in the fraud, but did detail the evidence that supported such a conclusion (including Kenia's statements). In October 1994, Kenia pleaded guilty to charges relating to the making of false statements in financial statements submitted to the Securities and Exchange Commission ("SEC").

II. *Procedural History*

In October 1996, a grand jury returned an indictment charging Polishan with, *inter alia,* conspiracy to falsify the books and records of LFC, the making of false statements in documents submitted to the SEC, securities fraud, bank fraud and wire fraud. Polishan was arraigned shortly thereafter.

A. Discovery

On November 26, 1996, the District Court appointed a Magistrate Judge to supervise discovery.

The Government adopted an "open file" policy, whereby it made available to defense counsel all material in the Government's possession, with the exception of privileged items and attorney workproduct. Defense counsel had access to the room in the federal building where the file was located and permission to bring in a photocopier. Discovery was completed on December 15, 1998.

On January 5, 1999, Polishan filed pre-trial motions arguing, *inter alia,* that the "open file" policy of the Government had proved impractical. He requested relief in the form of continuing access to the discovery file and, to facilitate access, requested that the Court establish a supervised document depository where documents would be stored until trial. The Magistrate Judge rejected this request, concluding that Polishan was given adequate opportunities to conduct discovery.

Polishan also requested identification by the prosecution of material under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Magistrate Judge concluded that "the Government has complied with its *Brady* obligations by providing a complete open file to the defendant for more than two years."

B. Trial

While Polishan's bench trial was initially scheduled for January 27, 1997, it began over three years later - on March 1, 2000. It continued for 35 days over four months. On July 5, 2000, the District Court found Polishan guilty of 18 of the 20 substantive counts. He filed post-verdict motions in August and September 2000. In those motions, he contended, for the first

time, that the Magistrate Judge had erred in his rulings on Polishan's pre-trial motions. On July 27, 2001, the District Court denied those motions. Thereafter Polishan was sentenced to nine years imprisonment, to be followed by three years of supervised release. This appeal followed.[1]

III. *Discussion*

A. Discovery Procedures

Polishan argues that, by holding the Government satisfied its obligation to produce *239 documents, the District Court violated his rights under *Brady* and Federal Rule of Criminal Procedure 26.2. The District Court held that Polishan had waived his right to object to discovery procedures by failing to seek reconsideration of the discovery rulings of the Magistrate Judge prior to trial.[2] We agree.

28 U.S.C. § 636 authorizes a district court to appoint a magistrate judge to hear and decide both dispositive and non-dispositive matters. For the former, the statute mandates a specific time within which objections are to be filed. 28 U.S.C. § 636(b)(1)(C) (authorizing "any party" to "serve and file written objections"

---

[1] The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this appeal from a judgment of conviction and sentence pursuant to 28 U.S.C. § 1291.

[2] The District Court also concluded that the Magistrate Judge's holdings were not clearly erroneous. Because we conclude that Polishan waived his right to object, we need not assess the merits of that conclusion.

within ten days of service of the findings and recommendations on dispositive motions). In contrast, § 636(b)(1)(A), which authorizes a magistrate judge to hear and decide pretrial non-dispositive matters, provides only that the district court judge "may reconsider any pretrial matter ... where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law," without specifying particular procedures for that reconsideration.

In all federal civil cases, Federal Rule of Civil Procedure 72(a) requires a party to serve and file objections to a magistrate judge's ruling on a "pretrial matter not dispositive of a claim or defense" of any party "[w]ithin 10 days after being served with a copy of the magistrate judge's order," and that "a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." There is no analogue to this rule in the Federal Rules of Criminal Procedure, but we have noted "the legislative history indicates that procedures are to be established by local rules." *United Steelworkers of Am. v. New Jersey Zinc Co., Inc.*, 828 F.2d 1001, 1006-07 (3d Cir. 1987) (citing H.R.Rep. No. 94-1609 at 10 (1976), *reprinted in* 1976 U.S.C. C.A.N. 6162, 6170). In the Middle District of Pennsylvania, Local Rule 72.2 provides that in a civil or criminal case any party aggrieved by the order of a magistrate judge may seek review by appealing to the district court within ten days. Thus, in keeping with our conclusion in *United Steelworkers,* we follow the procedure prescribed by this Local Rule.

1. *Jurisdictional Defect v. Waiver*

We reject the Government's contention that Polishan's failure to seek reconsideration under the

procedures specified by the Local Rule means that we lack jurisdiction to review the Magistrate Judge's holdings. We have always treated the defect as non-jurisdictional by allowing for review when "exceptional circumstances" exist. *Continental Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 251 n. 9 (3d Cir. 1998) (citing *Tabron v. Grace*, 6 F.3d 147, 153-54 n.2 (3d Cir. 1993)). If the defect were jurisdictional, of course, we would be unable to review the order even in the most exceptional of circumstances. *See United States v. Brown*, 299 F.3d 1252, 1260 (11th Cir. 2002) ("Although Brown argues for an equitable exception, the rule is jurisdictional and therefore is not subject to equitable exceptions.") (citations omitted). While we hold that we shall not review the Magistrate Judge's rulings because of Polishan's failure to seek reconsideration under the procedures specified by the Local Rule, we do so because he has waived his right to appellate review, not because our Court lacks jurisdiction to review his claims. *Accord United States v. Brown*, 79 F.3d 1499, ***240** 1504-05 (7th Cir. 1996) (holding that waiver is not jurisdictional); 12 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3070.1 (2d ed. 1997) ("Even where the [waiver] rule applies, it is not jurisdictional.").[3]

---

[3] We note that an appellate court may lack jurisdiction to review dispositive decisions made by a magistrate judge under 28 U.S.C. § 636(b)(1)(B) because that order is not final. Rather, it is a proposed finding and recommendation that must be accepted, rejected or modified by the district court. *Cf. United States v. Ritte*, 558 F.2d 926 (9th Cir. 1977)

2. *Waiver*

Because Polishan did not seek reconsideration of the Magistrate Judge's discovery ruling under the procedures specified by the Local Rule, he has waived the right to appeal that ruling. It is undisputed that, in civil cases, the right to appeal the ruling of a magistrate judge is waived if reconsideration before the district court is not sought in a timely fashion. *United Steelworkers,* 828 F.2d at 1008 ("[W]e hold that by failing to object in the district court to the magistrate's order striking its jury demand, Steelworkers has waived its ability to challenge that order on appeal."). We have not considered whether the right to appeal is similarly waived in criminal cases.

Polishan urges us to follow the Ninth Circuit, the only court to hold that the waiver rule does *not* apply in criminal cases. *United States v. Abonce-Barrera,* 257

_____(footnote continued)

(holding that because a magistrate judge's order issued under § 636(d) must be referred to a district court it "is not a final appealable order of the district court within the meaning of 28 U.S.C. § 1291"). In contrast, a non-dispositive decision made by a magistrate judge under 28 U.S.C. § 636(b)(1)(A) (as in this case) need not be reviewed by the district court unless objections to the order are raised. As a result, the order of the Magistrate Judge is final without further action by the District Court. *Continental Cas. Co.,* 150 F.3d at 250 ("In a subsection (A) referral, the magistrate judge's order has the force of law unless appealed. It is final in the sense that it may be appealed.").

F.3d 959 (9th Cir. 2001).[4] The Ninth Circuit relied on the fact that there is no time for objections set out in 28 U.S.C. § 636(b)(1)(A), and no gap-filler provided in the Federal Rules of Criminal Procedure. *Abonce-Barrera,* 257 F.3d at 967. The supervisory powers of the courts to form procedural rules are limited and while Federal Rule of Civil Procedure 72(a) provided a "clear basis in fact and law" justifying a waiver rule in civil cases, there is no clear basis in the criminal context. *Id.* at 967-68. The Court therefore held that AbonceBarrera had not waived his right to appeal the Magistrate Judge's discovery rulings.

This reasoning is simply not applicable to Polishan. Unlike *Abonce-Barrera,* here there is "a clear basis in law and fact" to apply a waiver rule to this criminal case. The Local Rules for the Middle District of Pennsylvania provide a time within which objections must be filed to a magistrate judge's rulings and that rule applies in both civil and criminal cases. Local Rule 72.2 for the Middle District of Pennsylvania ("Any party may appeal from a magistrate judge's order determining a nondispositive pretrial motion or matter *in any civil or criminal case.*") (emphasis added).

We note also that, by not timely seeking reconsideration by the District Court of the Magistrate Judge's discovery rulings (instead waiting until after the trial),

---

[4] The First, Fifth, Seventh, and Eleventh Circuits have, without comment, applied the waiver rule in criminal cases. *United States v. Akinola,* 985 F.2d 1105, 1108-09 (1st Cir. 1993); *United States v. Renfro,* 620 F.2d 497, 500 (5th Cir. 1980); *Brown,* 79 F.3d at 1504; *Brown,* 299 F.3d at 1260.

Polishan deprived the District Court of the *241 opportunity effectively to review that decision and to correct any errors. *Renfro,* 620 F.2d at 500. In the civil context, we have concluded that seeking review of rulings of magistrate judges for the first time after a trial would impermissibly allow a litigant a second bite at the apple. *United Steelworkers,* 828 F.2d at 1008 ("We cannot escape drawing the inference that Steelworkers, which never once suggested to the district court that it preferred a jury trial to the bench trial given it, wished to have two bites to the proverbial apple, and awaited that court's decision on the merits before raising the jury trial issue .... We cannot condone such trial tactics."). When objections are not raised until after the trial, even if the district court disagrees with the magistrate judge's discovery rulings, there is very little opportunity to correct those problems. As the District Court here noted, "[t]o allow Mr. Polishan to now raise a discovery-related issue as a basis for a new trial would be manifestly unfair to the government and wasteful of scarce judicial resources." *United States v. Polishan,* 2001 WL 848583, at *12 (E.D.Pa. Jul. 27, 2001); *see also United Steelworkers,* 828 F.2d at 1007 ("[B]y failing to file timely objections to the magistrate's discovery order, appellants not only stripped the district court of its function of effectively reviewing the magistrate's order, but also frustrated the policy behind the Magistrate's Act, i.e., to relieve courts of unnecessary work and to improve access to the courts.") (quoting *Niehaus v. Kansas Bar Ass'n,* 793 F.2d 1159, 1165 (10th Cir.

1986)).[5]

We conclude that Polishan has waived his right to appeal the rulings of the Magistrate Judge. He failed to comply with Local Rule 72.2, which provides a specific time within which to seek reconsideration of the rulings of a magistrate judge. And we find no "extraordinary circumstances" that would justify exercising our discretion to ignore his lack of compliance. *United Steelworkers,* 828 F.2d at 1008.

B. Admission of Evidence

Polishan argues that the District Court abused its discretion by admitting certain evidence in violation of the Federal Rules of Evidence. We reject these contentions because Polishan failed to raise objections to any objectionable evidence, and the admission of any potentially objectionable evidence did not constitute plain error.

1. *Admission of Testimony in Violation of Expert Witness Rule*

Polishan contends that Government witnesses presented inadmissible evidence by testifying about the corporate culture at LFC and by giving opinions regarding Polishan's mental state in violation of Federal Rules of Evidence 704(b) and 701(b). The Government retorts that the testimony was admissible under Federal

---

[5] Because we hold today that Polishan waived his right to appeal the rulings of the Magistrate Judge by not complying with Local Rule 72.2, we need not reach the issue whether, in the absence of that Local Rule, his failure to appeal the Magistrate Judge's rulings until after the trial also would have resulted in a waiver of his right to appeal those rulings.

Rule of Evidence 701 as lay opinion evidence. We review decisions of the District Court to admit opinion evidence for abuse of discretion. *United States v. Leo*, 941 F.2d 181, 192-93 (3d Cir. 1991). When contemporaneous objections are not made, we review the admission of evidence for plain error.[6] Fed.R.Evid. 103(d).

***242 i. Rule 704**

We reject Polishan's argument that the testimony of the Government's witnesses violated Federal Rule of Evidence 704(b). Testimony about "an ultimate issue to be decided by the trier of fact" is generally admissible. Fed.R.Evid. 704(a). It is only inadmissible if the testimony comes from an "expert witness testifying with respect to the mental state or condition of a defendant in a criminal case," in which case that witness may not "state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Fed.R.Evid. 704(b). The ultimate issue at trial was whether Polishan knew of and directed the

---

[6] We may reverse a district court for a plain error only if we conclude (1) an error was committed, (2) it was plain (clear and obvious), and (3) it affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 733-34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). If we conclude that the error is both obvious and prejudicial, we may order its correction, but are not required to do so. *Id.* We correct only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 734, 113 S.Ct. 1770 (internal citations omitted).

accounting irregularities at LFC. He claims that the Government's witnesses impermissibly gave their opinion on this issue, thus violating Rule 704(b). Because none of the witnesses to whom Polishan objects was an expert, that their testimony may have covered the issue of knowledge does not make it inadmissible.

ii. Rule 701

We reject Polishan's contentions of error under Federal Rule of Evidence 701. Any testimony that is arguably inadmissible under Rule 701 was not contemporaneously objected to, and its admission was not plain error.

Under Rule 701, lay opinion is admissible so long as it is (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. A witness testifying about business operations may testify about "inferences that he could draw from his perception" of a business's records, or "facts or data perceived" by him in his corporate capacity. *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403, 404 (3d Cir. 1980). Lay opinion testimony may be based on the witness's own perceptions and "knowledge and participation in the day-to-day affairs of [the] business." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993).

While we have never held that lay opinion evidence concerning the knowledge of a third party is *per se* inadmissible, we have certainly made this kind of evidence difficult to admit. If the witness fails to describe the opinion's basis, in the form of descriptions of specific incidents, the opinion testimony will be

rejected on the ground that it is not based on the witness's perceptions. *United States v. Anderskow*, 88 F.3d 245, 250 (3d Cir. 1996) (noting that opinion evidence must be "rationally based" on witness's perceptions). To the extent the witness describes the basis of his or her opinion, that testimony will be rejected on the ground that it is not helpful because the fact finder is able to reach his or her own conclusion, making the opinion testimony irrelevant.[7] *Anderskow*, 88 F.3d at 251 ("We do not understand how a witness' subjective belief that a defendant 'must have known' is helpful to a fact finder that has before it the very *243 circumstantial evidence upon which the subjective opinion is based.") (citing *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992)).

There is a fine line between statements that permissibly offer a witness's testimony about his or her own perceptions while supporting inferences about knowledge, and statements that constitute opinions on a witness's knowledge. In *Anderskow*, 88 F.3d at 249, we found no error in the admission of testimony where the witness "never explicitly opined on direct examination that [defendant] possessed guilty knowledge" but "provided several reasons to support the unstated

---

[7] If the opinion testimony is rejected on the ground that it is not helpful because it is repetitive, it follows that the admission of the opinion evidence will usually be considered harmless error. *See, e.g., Anderskow*, 88 F.3d at 251 (admission of opinion evidence harmless error because other circumstantial evidence of defendant's knowledge was overwhelming).

conclusion" that he did. Examples of such testimony included statements that defendants were "working toward a common goal" and that someone had told the witness that the defendant "would do anything they asked." *Id.* Statements that "furnished the basis for an inference, based on circumstantial evidence, that [defendant] had guilty knowledge which the government was free to suggest during its closing argument" did not implicate Federal Rule of Evidence 701. *Id.*

Most of the statements to which Polishan objected are analogous to the admissible statements in *Anderskow.* For example:

1. Vallecorse: Kenia was "totally committed" to, and "would do anything to please," Polishan. Polishan was the "puppet master" and Kenia was "subservient." Polishan had the "dominant personality" and Kenia "walked on egg shells" because he was "afraid."
2. Falkowitz: "Paul Polishan knew about anything and everything that went on in our company."
3. Pomerantz: Polishan was "completely knowledgeable about what was going on in my divisions" and "incredibly ... knowledgeable about the - all financial aspects of the business and intimately knew the details."

These statements are based on the witness's day-to-day knowledge of his or her business. *Lightning Lube, Inc.*, 4 F.3d at 1175. And they are statements that left the ultimate conclusion about whether Polishan knew about the accounting irregularities to the fact finder. In this context they are unobjectionable.

The evidence to which an objection could have been raised was not challenged contemporaneously. Vallecorse read into evidence a document that contained statements about the relationship between Polishan and Kenia, including the statement that "[i]t is difficult to believe ..., given the culture in Hanover, that Don Kenia would have altered financials, without Paul's knowledge or direction." Polishan did not object to the reading of this document. As his counsel stated, "I don't have an objection, evidentiary, or whatever that word is, but, procedurally, these documents are in evidence, they speak for themselves. He doesn't have to read them to the Court."[8]

We reject Polishan's argument that, because he raised a general objection at the pretrial conference to testimony on knowledge and reiterated that objection several times during trial, he should not be penalized for his "failure to catch each *244 iteration of the improper testimony, particularly when the court has already overruled counsel's objections several times." Reply Br. at 18 (citing to *American Home Assur. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985)).

---

[8] The Government also argues that Polishan stipulated to the admissibility of the document. Polishan responds that he reserved the right to argue that its contents were inadmissible. Even if we were to assume that he did reserve the right to argue that the contents were inadmissible (an assumption, from the face of the stipulation, that may be overly generous to Polishan), we would still reject his argument because, as noted above, he failed to object to admission of the document at trial.

Under the *American Home* test, "if a party files an unsuccessful motion *in limine* seeking the exclusion of certain evidence, that party need not formally object at trial when the evidence in question is introduced if two conditions are satisfied: (1) the party filed a written pre-trial motion setting forth reasons and case citations in support of the request that the evidence be excluded; and (2) the district court made a 'definitive' ruling with no suggestion that it would reconsider the matter at trial." *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 518 (3d Cir. 1997). Polishan's written pre-trial motion adequately explained the request that lay opinion evidence about Polishan's knowledge be excluded. But the District Court did not make a definitive ruling on this issue. The pretrial order explicitly "reserve[d] ruling on any evidentiary issue not decided by this order until the appropriate evidence has been presented within its context at trial." Polishan was not, therefore, excused from the requirement that he object at trial.

Because Polishan did not object to the admission of this testimony, we review its admission for "plain errors affecting substantial rights." Fed.R.Evid. 103(d). An error affects the substantial rights of a party only if it is prejudicial. *United States v. Williams*, 299 F.3d 250, 257 (3d Cir. 2002). Any error in the admission of Vallecorse's testimony was harmless because of the overwhelming weight of the other evidence provided by Vallecorse in support of his conclusions, and by the corroborating evidence provided by the other Government witnesses about the corporate culture at the Hanover facility. *See Anderskow*, 88 F.3d at 251 (admission of testimony that gave opinion of knowledge was

harmless error because other circumstantial evidence of defendant's knowledge was overwhelming).[9]

2. *Admission of Audit Report*

Polishan also maintains that the District Court erred in admitting the Audit Report because it was not a business record. Once again, the Government argues that Polishan waived his right to object by stipulating to its admission. Conceding he waived his right to object on most evidentiary grounds, Polishan counters that his waiver did not extend to the issue whether it was a business record. We agree. The relevant stipulation reads as follows:

> The report of the Audit Committee of the Board of Directors of the Leslie Fay Companies ... may be admitted into evidence upon the trial of this matter, without prejudice to the rights and positions of the parties as to the truthfulness, accuracy or evidentiary weight of such document, or as to whether such document is a business record.

Its plain language gives Polishan a safe haven to object to the Audit Report as a business report.

---

[9] Polishan also argues the inadmissibility of Vallecorse's negative answer to the question whether he believed Kenia's denials of Polishan's knowledge. No objection was made to this answer. And its admission was harmless because the District Court sustained the objection that was made to the Government's next question. When the Government asked Vallecorse why he did not believe Kenia, and the defense finally objected, the District Court sustained the objection on the ground that "I generally don't have witnesses testify as to whether somebody is credible in what they were saying."

Having not *waived* his right to object to the Audit Report's admission at trial as not a business record, it nonetheless does *245 not appear that Polishan ever exercised that right. Indeed, Polishan signed a second stipulation to the admissibility of the Audit Committee Report, with defense counsel's initials next to that exhibit on the exhibit list, indicating his agreement that the document "may be admitted into evidence without any further foundation of proof, or authenticity, and without calling a witness." He admitted during a telephone conference with the District Court that the Audit Committee Report was admissible so long as defense counsel could submit a responsive report. Finally, he failed to object when the Audit Committee Report was first introduced into evidence during the trial.

Thus, once again we review for plain error. At the outset, the error, if any, was hardly obvious or clear. As the Government notes, courts are divided on the question whether this document would be admissible as a business record. *Compare United States v. Frazier,* 53 F.3d 1105, 1110 (10th Cir. 1995) (audit report of accountant admitted as business record); *United States v. Blackwell,* 954 F.Supp. 944, 973-74 (D.N.J. 1997) (financial audit of bank admitted as business record); *Condus v. Howard Savings Bank,* 986 F.Supp. 914, 918 (D.N.J. 1997) (report prepared by outside company hired by bank to provide assessment of loss reserves admissible as business record), *with Lamb Eng'g & Constr. Co. v. Nebraska Pub. Power Dist.,* 103 F.3d 1422, 1432 n.5 (8th Cir. 1997) (report prepared by certified public accountant based on audit inadmissible because prepared for litigation); *Paddack v. Dave*

Christensen, Inc., 745 F.2d 1254, 1258 (9th Cir. 1984) (compliance audit inadmissible because company had no regular compliance audit procedure). Our precedent on this issue is not settled. *See generally United States v. Casoni*, 950 F.2d 893, 897 (3d Cir. 1991) (concluding that report prepared by lawyer in anticipation of litigation was not sufficiently trustworthy to be admissible, but noting that objective lawyer memoranda are sometimes business records). Given the divided case law, we conclude that the admission of the Audit Committee Report was not plain error.

* * * * * *

Polishan waived his right to appeal the rulings of the Magistrate Judge by not addressing his objections to the District Court in accord with Local Rule 72.2. As for the admission at trial of Vallecorse's testimony and the Audit Committee Report, they were not contemporaneously objected to, thereby limiting our review to a search for plain error. We find none. For these reasons, we affirm the judgment of the District Court.

APPENDIX B

Not Reported in F.Supp.2d
(Cite as: 2001 WL 848583 (M.D.Pa.))

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
Paul F. POLISHAN

No. 3:CR-96-274
July 27, 2001

MEMORANDUM

VANASKIE, Chief J.

*1 Following a 35-day non-jury trial and more than one week of deliberations, during which the voluminous record in this matter was studied extensively, I found defendant Paul F. Polishan guilty on 18 of 20 counts of an indictment accusing him of orchestrating a massive fraud of the financial accounting of the Leslie Fay Companies, Inc. Mr. Polishan has now moved for judgment of acquittal or, alternatively, a new trial, contesting the sufficiency of the evidence and essentially requesting that the verdict be reconsidered. Additionally, Mr. Polishan claims an entitlement to a new trial on the ground that the Magistrate Judge supervising discovery in this complex prosecution erred in

(a) finding that the government's "open file policy" satisfied its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and (b) in not according Mr. Polishan access to the government file between the close of a two-year discovery period and the commencement of the trial.

Having undertaken a laborious re-examination of the record in this matter, I find that Mr. Polishan's challenge to the sufficiency of the evidence, considered under both the standard of deference accorded verdicts challenged by way of a motion for judgment of acquittal as well as the more searching inquiry pertaining to a motion for a new trial, is without merit. As to Mr. Polishan's challenges to the Magistrate Judge's discovery rulings, I find that Mr. Polishan waived further judicial consideration of those issues by not timely requesting review of the Magistrate Judge's rulings, and that, in any event, Mr. Polishan's complaints concerning the discovery rulings and the government's compliance with the *Brady* rule are baseless. Accordingly, Mr. Polishan's post-verdict motions will be denied.

I. *BACKGROUND*

A. *Procedural History*

On October 29, 1996, the Grand Jury for this District returned an indictment charging Mr. Polishan with having conspired to falsify the books and records of the Leslie Fay Companies, Inc. ("Leslie Fay"). The conspiracy was alleged to have resulted in the substantial over-statement of net income for Leslie Fay, a publicly-traded corporation, for the years 1990, 1991, and 1992. During this period of time, Mr. Polishan was Leslie Fay's

Senior Vice-President of Finance, Chief Financial Officer and Chief Accounting Officer. In addition to the charge of conspiracy contained in Count 1 of the Indictment, the Grand Jury charged Mr. Polishan with seven counts of making false and fraudulent material statements and representations in a matter within the jurisdiction of the United States Securities and Exchange Commission in connection with the filing of various SEC Form 10Q and 10K statements, in violation of 18 U.S.C. § 1001 (Counts 2 through 8); one count of fraud in connection with the sale of securities, in contravention of SEC Rule 10b-5 (Count 9); bank fraud, in violation of 18 U.S.C. § 1344 (Count 10); and ten counts of wire fraud in connection with the issuance of various press releases concerning Leslie Fay earnings, in violation of 18 U.S.C. § 1343. (Counts 11 through 20.)

*2 The indictment followed an investigation undertaken by Leslie Fay's Audit Committee. In September of 1993, Leslie Fay's Audit Committee issued a 369-page report, which concluded that unsupported entries on the Leslie Fay general ledger resulted in an overstatement of pre-tax net income of more than $75 million for the years 1990 through 1992. The Audit Committee Report did not make a determination as to whether Mr. Polishan was a culpable participant in the fraud, but did detail the evidence that suggested such a conclusion. The most damaging evidence was the confession of Mr. Polishan's direct subordinate, Donald F. Kenia, who was Leslie Fay's Corporate Controller.

At the time that the accounting irregularities were initially disclosed (the end of January, 1993), Mr. Kenia claimed full responsibility and expressly denied that Mr.

Polishan was a culpable participant. Approximately two weeks after the fraud was disclosed, Mr. Kenia stated that Mr. Polishan was responsible for directing the illegal conduct. Mr. Kenia initially implicated Mr. Polishan during an interview conducted by attorneys and accountants retained by the Leslie Fay Audit Committee to investigate the matter. Mr. Kenia also named Mr. Polishan as the director of the fraud in interviews conducted by federal law enforcement authorities. In October of 1994, Mr. Kenia pled guilty to a two-count information charging him with violations of 18 U.S.C. § 1001 in connection with the filing of fraudulent 10K and 10Q statements during 1991 and 1992.

The return of the indictment in October of 1996 was also preceded by the filing of securities fraud class actions in which Mr. Polishan was named as a defendant. Mr. Polishan was represented by counsel in the class action litigation. The return of the indictment also followed an investigation undertaken by the SEC.

On November 21, 1996, Mr. Polishan was arraigned. By Order dated November 25, 1996, United States Magistrate Judge Thomas M. Blewitt was appointed as "Special Master" to preside over what was anticipated to be lengthy discovery. Thereafter, previously scheduled dates for completion of discovery, filing of motions and commencement of trial were postponed indefinitely so as to enable the defense to undertake the requisite review of the government's extensive file.

The government adopted an "open file" policy in this case, making available to the defense all material with the exception of attorney work product and other privileged items. The defense copied approximately

twenty banker boxes of the approximately 150 boxes of materials produced by the government. The defense also had available to it the Audit Committee Report as well as voluminous materials generated during the securities fraud litigation and SEC investigation, including transcripts of those who provided testimony in those proceedings.

Over a period of two years, Magistrate Judge Blewitt conducted several status conferences. In a written joint status report dated February 26, 1997, counsel represented that estimates for the cost of photocopying, imaging, coding or otherwise processing the voluminous documents ranged from $12,000 to $270,000, "depending on the number of documents processed and the level of document retrieval sought."[1] Accompanying the joint status report was a three- page "inventory" prepared by defense counsel, generically describing the contents of the boxes and binders of materials made available by the government.[2]

*3 On November 24, 1997, one year after Mr. Polishan was arraigned, Magistrate Judge Blewitt set

---

[1] According to the government, the defense rejected the government's offer to share the cost of copying the documents.

[2] According to the government, the documents generally consisted of materials generated by the Leslie Fay Audit Committee during its investigation; discovery material, including transcripts of testimony, generated during the securities fraud litigation and SEC investigation; Leslie Fay SEC filings; accounting work papers; FBI interview reports; bank records; tax records; and other miscellaneous records.

May 11, 1998 as the discovery deadline. The discovery deadline was subsequently extended to August 11, 1998.

During this lengthy period for discovery, Mr. Polishan was seeking to obtain funding of defense costs through insurance that had been procured by Leslie Fay. At no time, however, did Mr. Polishan request public funding of the costs of obtaining a complete copy of the documentation made available by the government.

Litigation commenced by the Leslie Fay insurer in the New York State courts resulted in a determination that the insurance company was not obligated to advance costs for the defense of this criminal prosecution. On July 14, 1998, Mr. Polishan filed in this matter a motion seeking to require the insurance company to advance his defense costs or to reimburse Leslie Fay for its funding of Mr. Polishan's defense costs. By Memorandum and Order filed on September 10, 1998, Mr. Polishan's motion was denied and the Clerk of Court was directed to remand the matter to United States Magistrate Judge Blewitt for the conclusion of discovery proceedings.

By Order filed on September 28, 1998, Magistrate Judge Blewitt set December 15, 1998 as the discovery deadline. Pretrial motions were directed to be filed by January 5, 1999. The Order stated that "[n]o further extensions of these deadlines will be granted under any circumstances."

On January 5, 1999, the defendant filed an "Omnibus Pretrial Motion," seeking suppression of evidence, challenging the indictment, requesting a non-jury trial, and raising discovery issues. The discovery-related issues were assigned to Magistrate Judge Blewitt.

Although acknowledging that the government had made available for inspection and copying approximately 650,000 to 1.2 million pages of documents, and that the defense had copied approximately 20 boxes of material, the defense maintained that its access to the government document repository for a period of approximately 2 years was inadequate. The defense requested that the Court establish a document "depository," to which both the defense and the government could have access as trial preparations continued. In addition, Mr. Polishan asked that the government be required to identify with specificity and produce in advance of trial "any evidence in the hands of the government which is favorable to the defendant and material to [the] question of his alleged guilt." (Omnibus Pretrial Motion at p. 12, ¶ 54.)

On March 9, 1999, Magistrate Judge Blewitt conducted oral argument on the discovery-related issues. By Order filed March 11, 1999, Magistrate Judge Blewitt, *inter alia*, denied the request for a document depository, but allowed the defense "to make individual requests for specific documents as the need for same becomes known...." (Order of March 11, 1999 at 2.) Magistrate Judge Blewitt also denied the request to require the government to identify with specificity *Brady* material, finding that "the Government has complied with its *Brady* obligations by providing a complete open file to the Defendant for more than two (2) years." The defense did not appeal the Magistrate Judge's discovery rulings.

*4 By Order dated March 12, 1999, the non-discovery issues raised in the defense Omnibus Pretrial Motion were addressed. Defendant's motions to

suppress evidence, to dismiss the indictment, and for a *James* hearing were denied. Its motion for a non-jury trial, in which counsel for the government concurred, was granted, and trial was scheduled to commence in September of 1999.

In July of 1999, the defense requested and obtained an adjournment of trial to afford more time for the preparation of a report by defendant's accounting experts. During a status conference conducted on October 15, 1999, defense counsel indicated that they could be prepared to commence trial in March of 2000. Also during the conference call, the government suggested that defense counsel review the government's pre-marked exhibits to enable stipulations of authenticity. By Order dated October 20, 1999, the parties were directed to exchange expert witness reports by Friday, January 21, 2000, and trial was scheduled to commence on March 1, 2000.

On December 29, 1999, defendant applied *ex parte* for public funding of the fees and expenses of the accounting firm that had been retained on behalf of the defendant, Goldstein Golub Kessler, LLP.[3] By sealed Order dated January 10, 2000, the *ex parte* application was granted. By Order dated January 21, 2000, the deadline for exchange of expert witness reports was

---

[3] This was the only application for public funding of defense costs made in this protracted case. Notably, this application was explicitly limited to the fees and expenses of Goldstein Golub Kessler, and did not seek funding to copy the government's file.

extended to February 14, 2000, but the trial commencement date of March 1, 2000 remained unchanged.

B. *Factual Background*

In connection with the trial, the defense stipulated to the admissibility of many exhibits as well as the truth and accuracy of a number of the paragraphs of the Indictment, indicating that all averments stipulated as truthful and accurate "shall be deemed proven beyond a reasonable doubt...." In this regard, it was stipulated that Leslie Fay considered itself to have been a leading producer of women's apparel in the United States, employing approximately 4,200 persons in 1992. Mr. Polishan had been an employee of Leslie Fay since 1969, ascending to the position of Senior Vice President of Finance in 1987. It was further agreed that Mr. Polishan supervised a number of individuals associated with the financial operations of Leslie Fay, including the corporate controller, the assistant corporate controller, and the controllers responsible for the different divisions within Leslie Fay. It was also agreed that Mr. Kenia had been an employee of Leslie Fay since 1976, and had served directly under Polishan since 1978.

The defense further stipulated that on February 1, 1993, Leslie Fay announced that its Audit Committee had undertaken an investigation into alleged accounting irregularities that could necessitate a restatement of Leslie Fay's 1991 earnings and the elimination of any profit for 1992. Mr. Polishan also stipulated that the Audit Committee eventually concluded that there were a number of unsupported entries made to Leslie Fay's accounting books and records, the cumulative effect of which was to overstate Leslie Fay's earnings for 1990 by

almost $5 million, for 1991 by more than $15 million, and for 1992 by more than $55 million. It was further stipulated that the Leslie Fay Audit Committee had quantified the overstatement of income only from unsupported entries, and that additional adjustments were to be made to Leslie Fay's financial statements because of Leslie Fay's deviation from Generally Accepted Accounting Principles ("GAAP").

*5 At trial, Mr. Polishan did not dispute the fact that a massive fraud had occurred. The evidence presented at trial showed that the fraud consisted principally of recording unsupported entries in the company's general ledgers to inflate the value of assets, (chiefly inventory), and understating expenses, (chiefly accounts payable and accrued liabilities). Mr. Polishan contended that the fraud was orchestrated by corporate controller Kenia with the assistance of divisional controllers, and that he had no knowledge of the fraud until he purportedly discovered its existence in late January of 1993.

At trial, the government presented compelling testimony that Mr. Polishan's claim of ignorance of the fraud was a prevarication. The evidence showed that Mr. Polishan was completely familiar with the company's intricate financial books and records. He had designed the formats for the periodic reports generated by the financial staff. Moreover, he ruled the financial department with an iron fist, leading by fear and intimidation. The witnesses testified, in particular, about his domination of Mr. Kenia. Particularly poignant was the testimony of Roger Vallecorse, a human relations specialist, who stated that in the Fall of 1992 Mr. Polishan required Mr. Kenia to state to Mr.

Vallecorse that "I [Kenia] am a f --- ing idiot ." Several divisional controllers provided testimony that entries on a report for the period ending June 27, 1992 in Mr. Polishan's handwriting resulted in unsupported entries being made to achieve the results reflected in Mr. Polishan's handwritten numbers. Several witnesses confirmed that Mr. Polishan and Mr. Kenia would meet at the company offices on Sundays. Mr. Kenia explained that the Sunday meetings were intended to determine the results that the fraud would achieve.

While there was no evidence that Mr. Polishan had himself made an unsupported entry on Leslie Fay's general ledger, the government introduced evidence showing that Mr. Polishan had caused the inflation of Leslie Fay earnings by other means. For example, a number of witnesses testified that invoices for several million dollars of goods were generated in late 1991, but the goods were not shipped until early 1992, thereby overstating the company's financial performance for 1991. Several Leslie Fay employees testified that Mr. Polishan had directed this fraudulent conduct. There was also evidence that the reserves for inventory and customer claims (referred to as "chargeback reserves") were set by Mr. Polishan at unrealistically low levels, thereby improving Leslie Fay's bottom line. William Perkoski, a controller of one of Leslie Fay's divisions, testified that Mr. Polishan directed him to change the aging treatment of inventory, making the inventory more current than it was and thereby inflating its value. John Dillon, another divisional controller, testified that in January of 1991 Mr. Polishan refused to set a reserve for a division because it would reduce earnings. Another

divisional controller testified that he had been directed to capitalize an expense, thereby inflating earnings.

*6 In connection with the accounting treatment of the gain on the 1991 sale of a Leslie Fay division -- HEAD -- the government produced memoranda prepared by Mr. Polishan stating that he had "inflated" company reserves "to protect future operations against adverse results," and that he had "enumerated as much as he could against the gain, moving it to operating income." The evidence showed that the capital gain from the sale of the division was understated by approximately $2.5 million and the operating results of other ongoing divisions inflated by that approximate amount. In other words, a one-time capital gain had been reduced and the results of other operating divisions fraudulently inflated to make the company appear to be performing better then it was.

The government's key witness, of course, was Mr. Kenia. He explained that Mr. Polishan directed the accounting treatment of the sale of the HEAD division in order to portray more favorable results of operating divisions. Mr. Kenia also presented detailed testimony as to the directions he received from Mr. Polishan to manipulate accounting entries to obtain desired results. If Mr. Kenia's testimony was found to be credible, a guilty verdict was inescapable.

Mr. Polishan took the stand in his own defense. He denied knowledge of the fraud, contending that Kenia had acted on his own. With respect to the memoranda he had prepared on the sale of the HEAD division, indicating that reserves were being "inflated," and capital gain was being "moved" to operating income, Mr.

Polishan contended that he had made a "poor choice of words." While not disputing that approximately $2.5 million of the capital gain on the sale of the division had been moved to inflate results of other divisions, he claimed that he was unaware that the manipulations had occurred.

Ultimately, I concluded that there was sufficient evidence to find Mr. Kenia's testimony believable beyond a reasonable doubt. Mr. Polishan's explanations were implausible and unsubstantiated. He denied the "f ___ ing idiot" story related by both Mr. Vallecorse and Mr. Kenia. Unlike Mr. Kenia, Mr. Vallecorse had no motive to fabricate this unique incident that afforded meaningful insight into Mr. Polishan's domination of Mr. Kenia. Mr. Polishan also denied telling Mr. Vallecorse that he (Polishan) felt responsible for creating the financial results of the company, as opposed to simply reporting the results. Mr. Vallecorse struck me as a very credible witness without any motive to lie. Mr. Polishan denied the invoicing of goods before shipment that occurred at the end of 1991, but at least three witnesses (Erickson, Weinstein and Kenia) all testified as to its occurrence. Neither Weinstein nor Erickson was part of the financial staff, and were found by me to be credible witnesses.

Also compelling a finding that Mr. Polishan was not to be believed was his account of his alleged "uncovering" of the fraud. Both Kenia and Polishan agreed that Kenia had been delinquent in providing audit packages for Leslie Fay's outside auditors who were present at the Leslie Fay offices in late January of 1993 to audit the books and records for 1992. Both

agree that there was an encounter late in the afternoon of Thursday, January 28, 1993 on this issue. According to Kenia, he told Polishan during that encounter that he could not cover the more than $20 million in unsupported entries that had been made. According to Kenia, Polishan then said that Kenia would have to fix the problem and Polishan left the office. According to Polishan, when Polishan confronted Kenia about not having produced the audit packages, Kenia said that there is a problem with the financial statements and that the financial performance of the company had been inflated by about $29 million. Polishan contends that when Kenia observed Polishan getting red, Kenia said that there was a "tax problem" that could explain the error. Polishan then decided to go home, leaving Kenia to find the "tax problem." Significantly, Polishan did not alert anyone else at Leslie Fay of Kenia's disclosure. Later that evening, Polishan called Kenia to ask if he had found the error, to which Kenia replied in the negative. The next morning, Polishan met with his attorney and asked for advice about the situation. His attorney advised Polishan that he should confront Kenia with a non-accounting staff person present as Polishan's witness. Both Kenia and Polishan are in agreement that on the morning of January 29th, Polishan met with Kenia alone, contrary to the advice Polishan had received from his lawyer. According to Kenia, Polishan, after learning that Kenia had been unable to "fix" the problem, stated that Kenia was "on his own." Polishan acknowledges that he stated to Kenia that Kenia was "on his own." Both Polishan and Kenia are in agreement that Kenia left Polishan's office. Polishan then summoned

Terry Erwine into Polishan's office and called for Kenia. With Erwine now present, Polishan told Kenia to tell Erwine what Kenia had been doing. At this point, Kenia acknowledged the commission of the fraud and took sole responsibility.

*7 The fact that Polishan did not disclose to others at Leslie Fay Kenia's alleged admission during the afternoon of January 28, his apparent readiness to accept some undefined tax problem as the source of the error, despite his intimate familiarity with the financial affairs of Leslie Fay and the size of the overstatement of income, combined with the fact that Polishan saw his attorney and discussed the matter of Kenia's disclosure, and then confronted Kenia without an independent witness present, disregarding the advice he had just received from his attorney, all weigh against Mr. Polishan's credibility. His muted reaction to Mr. Kenia's statement that the financial results had been overstated by more than 20 million dollars, his immediate departure from the office without working to find the alleged "tax problem," his checking in with Kenia during the evening of January 28th, his meeting with his lawyer on the morning of January 29th, his one-on-one encounter with Kenia on the morning of January 29 th and his complete domination of Kenia combined to compel a determination that Mr. Polishan's self-proclaimed discovery of the fraud was a fabrication. Mr. Polishan's handling of the events of January 28th and 29th indicated that he had directed the fraud, hoped that Mr. Kenia would find a way to cover the fraud, but if he could not, Mr. Polishan would find a way to distance himself from Mr. Kenia. Thus, when he learned on the

morning of the 29th that Mr. Kenia could not find a way to hide the fraud from the auditors, Mr. Polishan informed Mr. Kenia that he was on his own and then had Mr. Kenia acknowledge responsibility in the presence of a third person, just as he had Mr. Kenia say that he was a "f ____ ing idiot" in the presence of a third person just a few months prior to this incident.

Mr. Polishan's testimony in other material respects was found not to be credible. For example, I found that, contrary to his explanations, company reserves were deliberately manipulated to achieve financial results. The evidence showed that Mr. Polishan alone was responsible for setting the reserves.

In summary, recognizing that Mr. Kenia was a biased witness who had indeed initially accepted full responsibility for the fraud, and had admittedly engaged in the fraud, I scrutinized the evidence to assure myself that his testimony was credible beyond a reasonable doubt. I found that his testimony was corroborated by testimony of a number of other witnesses as well as documentary evidence presented in the case. Thus, after much deliberation, I found that the government had carried its burden of proof on 18 of the 20 counts in issue.[4] A general verdict was returned on July 5, 2000.[5]

---

[4] Mr. Polishan was found not guilty on two wire fraud counts that concerned issuance of press releases in June of 1992 concerning the announcement of Leslie Fay's intention to buy back shares of the company.

[5] Rule 23(c) of the Federal Rules of Criminal Procedure provides:

Immediately following the delivery of the verdict, I granted defendant's motion to extend the time for filing a motion for a new trial until August 14, 2000. By Order dated August 10, 2000, the time for filing post-verdict motions, other than a motion for new trial, was extended to September 13, 2000. On August 14, 2000, Mr. Polishan moved for a new trial, asserting that the verdict was contrary to the weight of the evidence and that "[a] fully informed adjudication of this case did not occur due to limitations on the defendant's ability to adequately prepare and present his defense," with the primary limitation being the "inability to locate, obtain and analyze the voluminous documentary evidence needed for an adequate defense ...." (Motion for New Trial (Dkt. Entry 198) at 1.) On September 13, 2000, defendant filed an "Omnibus Post-Verdict Motion," including a motion for judgment of acquittal, motion for reconsideration and motion for new trial. Briefing on the post-verdict motions has been completed and this matter is ripe for disposition.

_____(footnote continued)

> In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

During the course of the trial, I inquired as to whether the prosecution or defense was requesting that findings of fact be made in this matter. Both sides indicated that they were not requesting that the court find the facts specially; both sides agreed that a general verdict should be returned.

II. *DISCUSSION*

A. *Motion for Judgment of Acquittal*

*8 Mr. Polishan contends that the evidence was insufficient to sustain a conviction on any of the counts in this indictment. "When reviewing a claim of insufficiency of the evidence, 'the standard of review is exactly the same regardless of whether the verdict was rendered by a jury or by a judge after a bench trial.'" *United States v. Pierce,* 224 F.3d 158, 164 (2d Cir. 2000). *Accord, United States v. Barletta,* 565 F.2d 985, 991 (8th Cir. 1977); *United States v. Carter,* 311 F.2d 934, 940 (6th Cir.), *cert. denied sub nom., Felice v. U.S.,* 373 U.S. 915 (1963). "In reviewing the sufficiency of the evidence after a bench trial, 'the test is "whether the evidence is sufficient to justify the trial judge, as trier of fact, in concluding beyond a reasonable doubt, that the defendant was guilty.'" *United States v. Doe,* 226 F.3d 672, 680 (6th Cir. 2000), *cert. denied,* 121 S.Ct. 840 (2001). As in the case of a jury verdict, the evidence must be examined in the light most favorable to the government, with all conflicts in the testimony resolved in favor of the government and all reasonable inferences drawn in its favor. *Id. Accord, United States v. Pierce,* 224 F.3d at 164; *United States v. Adams,* 174 F.3d 571, 578 (5th Cir. 1999); *United States v. Ismail,* 97 F.3d 50, 55 (4th Cir. 1996). "[T]he evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a [judge] could find the defendant guilty beyond a reasonable doubt." *United States v. Casper,* 956 F.2d 416, 421 (3d Cir. 1992). "The evidence is to be viewed 'not in isolation but in

conjunction.'" *United States v. Mariani,* 725 F.2d 862, 865 (2d Cir. 1984). Consequently, the burden on a defendant who raises a challenge to the sufficiency of the evidence is extremely high. *United States v. Helbling,* 209 F.3d 226, 238 (3d Cir. 2000), *cert. denied,* 121 S.Ct. 833 (2001).

In this case, the defendant cannot sustain the heavy burden of demonstrating that, when viewed in the light most favorable to the government, the evidence was insufficient to sustain the finding of guilty beyond a reasonable doubt on any of the 18 counts on which he was convicted. As the government observes, "the testimony of Don Kenia alone is sufficient to sustain the verdict even without considering the fact that his testimony was corroborated by numerous other witnesses as well as substantial documentation." (Government Response to Defendant's Omnibus Post-Verdict Motion (Dkt. Entry 211) at 24.) Mr. Kenia's testimony established an agreement or understanding between him and Mr. Polishan to falsify the books and records of Leslie Fay for the purpose of inflating its financial results. His testimony also served to show that overt acts were performed both by him and by Polishan to further the purposes of the agreement or understanding. Viewed in the light most favorable to the government, the evidence was plainly sufficient to sustain a determination, beyond a reasonable doubt, that Mr. Polishan had entered into a conspiracy, as charged in the indictment, in violation of 18 U.S.C. § 371.

*9 The evidence also established that quarterly and annual filings required by the SEC, which are the subject of Counts 2 through 8 of the Indictment, contained

fraudulent material statements, that Mr. Polishan knew the government-required filings falsely depicted Leslie Fay's financial performance, and that he nonetheless caused the 10Q and 10K Forms to be filed. The submission of the fraudulent 10Q and 10K Forms, as well as press releases that touted the fraudulently inflated results of Leslie Fay and telephone conference calls with members of the investment community in which Mr. Polishan participated and which also reiterated results of the company's financial performance that Polishan knew to be false, amply sustain the securities fraud conviction on Count 9 of the Indictment.

As to the bank fraud charge in Count 10 of the indictment, Mr. Polishan argues that "[b]ased on the originally reported 1991 and 1990 financial statements, the company had sufficient cushion, with respect to bank balances and ratios, that the false entries would not have had any effect on the company's debt compliance." (Brief in Support of Omnibus PostVerdict Motion (Dkt. Entry 208) at 12.) Mr. Polishan further argues:

> The government presented no evidence that the defendant knew Leslie Fay's 1992 10Qs were misstated to a great enough extent that the company risked defaulting on any of its loans. Nor did the government present any evidence that the banks would have refused to provide Leslie [Fay] financing if they had originally received 10Qs that had not been inflated. The government did not present any evidence indicating that the defendants specifically intended to expose the banks to any loss whatsoever. The government did

> not present sufficient evidence to prove any actual or potential loss to the banks. The evidence indicates the banks were merely coincidental recipients of Leslie Fay's inflated financial statements. No evidence was presented to prove beyond a reasonable doubt that the financial integrity of any bank was threatened in this case.

(*Id.* at 12-13.)

Mr. Polishan's arguments ignore the stipulations made before and during trial. Specifically, defendants stipulated that in January of 1992 Leslie Fay entered into a financing agreement with several financial institutions, all of which were then insured by the Federal Deposit Insurance Corporation. Defendant further stipulated that "*[i]n order to induce the banks to enter into the financing agreements,* [Leslie Fay] warranted that its financial statements were correct and fairly presented the financial position of the company." (Indictment, ¶ 16; emphasis added.) Of course, the financial statements fraudulently inflated the company's financial performance. It was further agreed that Leslie Fay had warranted that its financial statements "were complete and correct in all material respects and were prepared in reasonable detail and in accordance with Generally Accepted Accounting Principals (GAAP)...." (*Id.*) There were also stipulations that the financing agreements required Leslie Fay to maintain certain levels of consolidated working capital and consolidated net worth "or else a default would occur." (*Id.* at ¶ 17.) During the course of the trial, the defense stipulated that officials of Leslie Fay's lending institutions would testify that, had

they known that information submitted by Leslie Fay was fraudulent, they would not have extended the financing. Moreover, the government presented evidence through an expert witness who testified that violations of covenants concerning net worth and working capital were hidden by the fraudulent inflation of the company's financial results, thereby avoiding the declaration of an event of default. Plainly, the evidence, combined with the stipulations entered into by the defendant, were sufficient to sustain a conviction of bank fraud.

*10 Finally, the evidence was plainly adequate to sustain the wire fraud convictions under Counts 11, 12, and 15 through 20. In this regard, the evidence showed that press releases transmitted by wire in interstate commerce touted the falsified financial results of the company.

In summary, Mr. Polishan has not mounted a viable attack on the findings of guilt made in this matter. Accordingly, he is not entitled to a judgment of acquittal.

B. *Motion for a New Trial*

1. Sufficiency of the Evidence

Federal Rule of Criminal Procedure 33, in relevant part, provides that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." The district court must exercise its discretion in determining whether a new trial is warranted. *See United States v. Console,* 13 F.3d 641, 665 (3d Cir. 1993), *cert. denied,* 511 U.S. 1076 (1994); *United States v. Skelton,* 893 F.2d 40, 44 (3d Cir.), *cert. denied,* 498 U.S. 814 (1990). Thus, "[a] court evaluates

a Rule 33 motion from a different vantage point than it evaluates a Rule 29 motion for judgment of acquittal." *United States v. Saborit,* 967 F.Supp. 1136, 1144 (N.D.Iowa 1997). Unlike a motion for judgment of acquittal, a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence calls upon the trial court to weigh the evidence and evaluate the credibility of witnesses. *Id.* Nonetheless, "[a] motion for a new trial is not favored and is viewed with great caution." *United States v. Miller,* 987 F.2d 1462, 1466 (10 th Cir. 1993). "It is a remedy to be used sparingly, reserved for exceptional circumstances, where the evidence preponderates heavily against the verdict or where failure to grant a new trial would result in a miscarriage of justice." *United States v. Fenech,* 943 F.Supp. 480, 486 (E.D.Pa. 1996).

In this case, the points made on behalf of Mr. Polishan in his post-verdict briefs were, for the most part, advanced on his behalf at the conclusion of the trial and were considered in reaching the decision that the government had met it substantial burden of proof. To be sure, the points reiterated by Mr. Polishan required intense scrutiny of the record. For example, the fact that Mr. Kenia initially accepted responsibility for the entire fraud, denying that Mr. Polishan was a culpable participant, required that his testimony be weighed with great caution, as did the fact that he had reached a very favorable agreement with the government in exchange for his cooperation. The fact that Mr. Kenia admitted not informing Mr. Polishan of the full extent of the fraud also militated against acceptance of his testimony without corroboration. But there was indeed substantial

corroboration in the form of the testimony of divisional controllers, the manager of the Leslie Fay distribution center in Pennsylvania, the former human relations director, and other witnesses. Documentary evidence, including, in particular, memoranda authored by the defendant in connection with the sale of the HEAD division and the financial records for the period ending June 27, 1992 bearing Mr. Polishan's handwritten notations, amply confirm Mr. Kenia's accounts of the defendant's participation in the fraud.

*11 In summary, while I have carefully considered the arguments advanced on behalf of Mr. Polishan, I remain convinced in the soundness of my verdict. The points made by the defendant are not sufficiently compelling as to indicate that the interests of justice would be served by conducting a new trial in this matter.

2. Discovery-Related Matters

Mr. Polishan complains that his ability to prepare for trial was unfairly impaired by the need to review the massive amount of material that had been compiled by the government and made available to him. In particular, he notes the inability to afford to photocopy the documentation amassed by the government. He faults Magistrate Judge Blewitt for failing to have directed the establishment of a document depository to which he would have had access after the close of discovery in December of 1998. He also contends that the Magistrate Judge erred in not compelling the government to identify with specificity *Brady* material.

Mr. Polishan is not entitled to a new trial on the basis of these discovery-related matters for two reasons. First, he failed to preserve the issues by timely seeking

review of Magistrate Judge Blewitt's determinations. And second, Magistrate Judge Blewitt did not abuse his discretion in handling either of these discovery-related matters.

As to the waiver issue, Magistrate Judge Blewitt had authority to decide discovery-related issues by virtue of 28 U.S.C. § 636(b)(1)(A).[6] With respect to a referral of a matter within the magistrate judge's authority conferred by § 636(b)(1)(A), "the magistrate judge's order has the force of law unless appealed." *Continental Casualty Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 250 (3d Cir. 1998).

Local Rule of Court 72.2 provides that "[a]ny party may appeal from a magistrate judge's order determining a non-dispositive pretrial motion or matter in any civil

---

[6] Section 636(b)(1)(A) provides:

> Notwithstanding any provision of law to the contrary -- (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

or criminal case in which the magistrate judge is not the presiding judge of the case, within ten (10) days after issuance of the magistrate judge's order, unless a different time is prescribed by the magistrate judge or a judge." (Emphasis added.) In this case, Mr. Polishan did not appeal Magistrate Judge Blewitt's March 11, 1999 decision refusing to establish a document depository and denying the request to compel the government to specifically identify *Brady* material. Under these circumstances, there was no occasion for further review of the Magistrate Judge's decision, which became final upon the expiration of the ten day appeal period prescribed by Local Rule of Court 72.2.

It has been recognized that, as a general rule, the failure to challenge a magistrate judge's ruling on a matter within the authority conferred by § 636(b)(1)(A) precludes appellate court consideration of the matter. *Continental Casualty Co.*, 150 F.3d at 252-53; *United Steelworkers of America v. New Jersey Zinc Co.*, 828 F.2d 1001, 1007-08 (3d Cir. 1987) ("[P]arties who wish to preserve their objections to a magistrate's order entered pursuant to § 636(b)(1)(A) must file their objections in the district court within ten days as set forth in Fed.R.Civ.P. 72(a).") This waiver rule has been applied in the context of discovery rulings made by magistrate judges in criminal proceedings. *See, e.g., United States v. Brown,* 79 F.3d 1499, 1503-04 (7th Cir.), *cert. denied,* 519 U.S. 875 (1996); *United States v. Renfro,* 620 F.2d 497, 500 (5th Cir.), *cert. denied,* 449 U.S. 921 (1980).

***12** Although the cases apply the waiver rule in the context of appeals, the same considerations that underlie foreclosing of appellate court review are present where,

as here, the matter is first raised in the district court after a verdict. In *Brown, supra,* the court explained that the waiver rule was intended to prevent a litigant "from 'sandbagging' the district judge by failing to object and then appealing." 79 F.3d at 1504, *quoting Thomas v. Arn,* 474 U.S. 140, 147 (1985). In the absence of a waiver rule, a district judge may be required to review every issue decided by a magistrate judge, regardless of the parties' satisfaction with the magistrate judge's ruling. The absence of a waiver rule would defeat interests of judicial economy and efficiency that referral of non-dispositive issues to magistrate judges is intended to promote. As explained by the Seventh Circuit, review by a district judge of a magistrate judge decision, "preferably before the initiation of trial, serves the interests of judicial economy by placing the issue before a trial judge who is more intimately familiar with the details of the case than this court could hope to become and is, therefore, in a better position initially to review the merit of the request." *United States v. Reddick,* 620 F.2d 606, 607 (7th Cir. 1980). But judicial economy is not served where, as here, a defendant awaits the outcome of a verdict before first raising the issue before the district judge. To allow a party to challenge a magistrate judge's ruling after an adverse verdict has been obtained would disserve the interests of judicial economy.

In this case, trial consumed 35 days, and deliberations lasted for more than one week. To allow Mr. Polishan to now raise a discovery-related issue as a basis for a new trial would be manifestly unfair to the government and wasteful of scarce judicial resources.

In *Renfro,* the defendant did not challenge a magistrate judge's discovery ruling until after he was found guilty. The appellate court, observing that the delay in raising the issue "deprived the trial judge of his ability to effectively review the magistrate's holding," 620 F.2d at 500, ruled that it would not address the discovery issue on appeal. In this case, Mr. Polishan's failure to raise the discovery issues prior to trial has similarly deprived this Court of an ability to effectively review the magistrate judge's holding. Under these circumstances, application of a waiver rule is plainly warranted.

Even if judicial review of the discovery-related rulings remained available, Mr. Polishan has not shown that the interests of justice warrant a new trial. In this regard, review of Magistrate Judge Blewitt's decisions is limited to ascertaining whether they are "clearly erroneous or contrary to law." 18 U.S.C. § 636(b)(1)(A). Thus, as one court has observed in the context of a magistrate judge's discovery rulings in a criminal case, for the defendant to prevail in his challenge to the magistrate judge's rulings, the defendant "must show not that the Magistrate Judge *could have* exercised his discretion and granted [defendant's] discovery requests, but rather that [defendant] is entitled to the discovery he seeks as a matter of law." *United States v. Cleveland,* No.Crim. A. 96-207, 1997 WL 208909, at *2 (E.D. La. April 28, 1997) (emphasis in original).

*13 Mr. Polishan has not cited any authority holding that a document depository was required to be established in this case. Moreover, the magistrate judge did not abuse his discretion in denying Mr. Polishan's request. It must be remembered that Mr. Polishan had

more than two years within which to review the documents in the possession of the government. While the documentation was indeed massive, no showing has been made that the documents could not have been reviewed within the extended period of discovery allowed in this case. While financial constraints may have precluded a carte blanche photocopying of the records, the defendant had the ability to review and identify those documents material to the case. Furthermore, Mr. Polishan could have sought public funding for the cost of obtaining copies of documents. Indeed, the defendant requested and obtained public funding for defense expert witness services, at a cost of nearly $400,000. It must also be borne in mind that the defendant was a participant in the securities fraud class actions that were brought in the wake of the disclosure of the fraud. He thus had access to transcripts of witnesses and documents produced during the course of that litigation. Under these circumstances, Mr. Polishan's protests of prejudice due to the volume of material amassed by the government in this case ring hollow. The difficulties encountered by the defendant in assessing the material compiled by the government are simply not a sufficient reason to order a new trial.

With respect to the request that the government identify with specificity *Brady* material, there is indeed some authority to support the proposition that an open-file policy does not relieve the government of the obligation to identify *Brady* material. *See, e.g., United States v. Hsia,* 24 F.Supp.2d 14, 29-30 (D.D.C. 1998) ("The government can not meet its *Brady* obligations by providing Ms. Hsia with access to 600,000 documents

and then claiming that she should have been able to find the exculpatory information in the haystack. To the extent that the government knows of any documents or statements that constitute *Brady* material, it must identify that material to Ms. Hsia."); *United States v. McVeigh,* 954 F.Supp. 1441, 1443 (D.Colo. 1997). There is [sic], however, contrary precedents. *See, e.g., United States v. Mmahat,* 106 F.3d 89, 94 (5th Cir.) ("There is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents within the larger mass of material that it has already turned over."), *cert. denied,* 522 U.S. 848 (1997); *United States v. Eisenberg,* 773 F.Supp. 662, 687-88 (D N.J. 1991); *United States v. Bloom,* 78 F.R.D. 591, 617 (E.D.Pa. 1977). As explained in *Eisenberg:*

> *Brady* is "designed to 'assure that the defendant will not be denied *access* to exculpatory evidence only known to the Government.'" As the Third Circuit has stated, "'the [g]overnment is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.'"
>
> ***14** The Government represents it has complied with its *Brady* obligations. [Defendant] does not assert that the Government has concealed exculpatory evidence. Rather, he asserts that he should not have to expend the effort required to review a substantial number of documents in order to

> ascertain whether they contain exculpatory information. He asserts the onus of making such effort should be borne by the Government. The Government represents ... that counsel for the Defendants spent a substantial amount of time reviewing the documents produced by the Government. Moreover, [Defendant] does not complain that he was denied sufficient access to these documents. The Government has complied with its *Brady* obligations ....

773 F.Supp. at 687-88 (emphasis in original).

In this case, the evidence before the Magistrate Judge indicated that defense counsel spent considerable time reviewing the documents made available by the government. These documents were available for a period of two years. Under these circumstances, a determination that the government's open file policy in this case satisfied its *Brady* obligations cannot be said to have been clearly erroneous.[7]

---

[7] Defendant's prolix motion for new trial baldly asserts a number of other reasons for directing a re-trial of this case. For example, the defense contends that the government failed to provide copies of exhibits during the course of the trial. Defendant, however, does not cite to any part of the record to substantiate this assertion. Moreover, the defense does not cite to any part of the voluminous record to indicate that the matter was brought to the Court's attention or that the Court otherwise denied a request that the government produce a copy of a specific document. In the absence of a specific citation to the record, judicial review of such a contention is not practicable. *See F.D.I.C. v. Schuchmann*, 235 F.3d 1217,

_____(footnote continued)

1230 (10th Cir. 2000); *Grant v. Murphy & Miller, Inc.*, No. 99 C 5590, 2001 WL 681286, at *13 (N.D. Ill. June 13, 2001); *Thomas v. Larson,* No. Civ. A. 00-999, 2001 WL 185729, at *9 n. 33 (E.D.Pa. Feb. 27, 2001).

In the Brief in support of the "omnibus post-verdict motion," defendant argues that the court "contributed to the document problem" by, *inter alia,* "erring in certain of its *in limine* rulings regarding requests for issues or witness lists or other similar accommodations; delaying too long in granting defendant's *ex parte* request [for public funding of expert witness services] which was granted in January, 2000; by not granting the defense's October 14, 1999 request for an April 2000 trial start date ...; denying motion for judgment of acquittal; denying motion for indemnification of defense expenses; denying certain pretrial motions including requests for bill of particulars ...; and any other grounds in defendant's motion." (Dkt. Entry 208 at 16-17.) None of these contentions warrants extended discussion. The government was not obligated to provide "issue or witness lists." At the close of each trial day, the government did identify for the defendant the witnesses the government intended to call the following day, thus providing some opportunity to prepare for cross examination. The defense does not cite any instance when it was denied a continuance to prepare to cross examine a witness. As to the start of the trial, the defense agreed that it would be ready by March 1, 2000. Moreover, the trial played out over a period of four months, with significant gaps between trial dates, thus undermining any claim of prejudice as to the commencement of the trial itself. A formal application for public funding of expert witness services was not made until the end of December, 1999, and no prejudice has been shown by the fact that the application was granted in January of 2000. Nor has it been shown that the defense

III. *CONCLUSION*

For the reasons set forth above, defendants' post-verdict motions will be denied. An appropriate Order is attached.

s/Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge

ORDER

NOW, THIS 27th DAY OF JULY, 2001, for the reasons set forth in the foregoing Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Defendant's Motion for New Trial (Dkt. Entry 198) is DENIED.

2. Defendant's Omnibus Post-Verdict Motion (Dkt. Entry 207) is DENIED.

s/Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge

---

appealed the decision of Magistrate Judge Blewitt denying the request for a bill of particulars or that his denial was clearly erroneous.

In summary, the defense has neither substantiated its claims of prejudicial trial court error by particular reference to the record nor has the defense supported its bald assertions with pertinent authority. Under these circumstances, a new trial for any or all of the litany of reasons conclusorily asserted by the defendant is not warranted.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1325

UNITED STATES OF AMERICA

v.

PAUL F. POLISHAN, Appellant

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and MAGILL*, Circuit Judges

---

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in

---

* Honorable Frank J. Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court

/s/ Thomas L. Ambro
Circuit Judge

Dated: **27 AUG 2003**